

Officer's Report

Application Number	HGY/2023/0371
Type	Lawful development: Existing use
Location	100 Lansdowne Road, Tottenham, London, N17 9XX
Proposal	Certificate of lawfulness for the existing use of the whole site as a childcare nursery (Use Class E(f)).
Case Officer	Mercy Oruwari
Valid Date	07/02/2023
Applicant	Ms Georgina Bossman
Agent	Mr Ike Obanye

RECOMMENDATION

Refuse

PROPOSED DEVELOPMENT AND LOCATION DETAILS

The application is for a certificate of lawfulness for the existing use of the whole site as a Nursery (use class E(f) – creche, day nursery (not residential)). This certificate addresses the continued use of the property as a nursery for the past 10 years. It does not address the number of attendees or any environmental or noise issues.

The subject site is a two storey mid terrace property with a converted loft space. The property has a double storey rear outrigger. As well as having a rear garden it also has a substantial front garden. The site is not located within any conservation area and does not fall within the curtilage of a listed building.

RELEVANT PLANNING AND ENFORCEMENT HISTORY PLANNING APPLICATION HISTORY

- CON/2022/00496 – Breach of conditions regarding number and age of children (attendees). Noise and environmental issues. Ongoing
- HGY/2019/1036 - Application for a non-material amendment following a grant of planning permission HGY/2018/0911 for the replacement of 2 existing windows on the ground floor of the front elevation, with 2 new emergency escape fire doors - Refused
- HGY/2019/1034 - Certificate of lawfulness for the erection of a proposed outbuilding at the rear of the garden (for use as a garden office) - Pending Decision
- HGY/2018/0911 - The proposed development includes the: - Single storey ground floor rear infill extension - Change of use of the ground floor from C3 Residential Use to D1 Preschool Learning Centre (Nursery) - Conversion of the 1st and second floor to a 3no. bed family sized maisonette - Grant permission
- HGY/2018/0296 - Certificate of lawfulness for formation of dormer in rear roof slope and installation of one roof light to front roof slope - Permission not required
- HGY/2013/0886 - Change of use of existing property from Residential (C3) to Nursery (D1) - Refused

CONSULTATION RESPONSE

No one was consulted regarding the application but comments were received from Cllr Bevan.

- The premises is residential and not suitable for use as a nursery.

Officer comments: As this is a certificate of lawfulness for existing use, we can only consider the evidence of the use of the property over the past ten years.

RELEVANT LEGISLATION AND GUIDANCE

The application has been made under section 191 of the Town and Country Planning Act 1990 (as amended). Section 191 of the 1990 Act provides for anyone to apply to the local planning authority (LPA) for a lawful development certificate (LDC). A certificate is a statutory document certifying the lawfulness, for planning purposes, of existing operations on, or use of land, or some activity being carried out in breach of a planning condition.

By virtue of section 191 (2), uses and operations are "lawful" if no enforcement action may be taken against them and they are not in contravention of any enforcement notice which is in force. And, by virtue of section 191(3), a failure to comply with any condition or limitation subject to which planning permission has been granted is "lawful" if the time for taking enforcement action in respect of the failure has expired and it does not constitute a contravention of any enforcement notice or breach of condition notice which is in force.

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Development or other activity on land is lawful for planning purposes if it is within one of the following categories and does not involve a failure to comply with a condition or limitation subject to which planning permission has been granted:

- (1) it is not within the definition of "development" in section 55(1) and (1A) of the 1990 Act. (This might be because it is so insignificant that it can be disregarded (a "de minimis" operation, use or activity); or because it involves a change of use which is not, as a matter of fact and degree, materially different, for planning purposes, from a previous lawful use of land.); or
- (2) it is specifically excluded from the definition of development by section 55(2) (for example, a use of land for the purpose of "agriculture"); or
- (3) it is within the definition of "development" in section 55, but is exempted from the need for planning permission by the provisions of section 57; or
- (4) it benefits from an extant grant of planning permission under Part III of the 1990 Act (or the equivalent Parts of preceding Acts); or
- (5) it benefits from a general planning permission granted by the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418), or by a simplified planning zone or enterprise zone scheme; or
- (6) it benefits from deemed planning permission, whether under section 90 or by virtue of compliance with the requirements of an effective enforcement notice; or
- (7) it took place before 1 July 1948 (the "appointed day" Country Planning Act 1947); or
- (8) it is development by or on behalf of the Crown; or
- (9) the time for taking enforcement action has expired.

"Taking enforcement action" is defined in section 171A of the 1990 Act. It is the issue of an enforcement notice or the service of a breach of condition notice. The section also defines a "breach of planning control" (against which it is possible to take enforcement action) as the carrying out of development without the required planning permission, or failing to comply with any condition or limitation subject to which planning permission has been granted.

Section 171B of the 1990 Act specifies the time-limits for taking enforcement action which are as follows:

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of ten years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent—

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or taking further enforcement action in respect of any breach of planning control if, during the period of ten years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.

ANALYSIS/ASSESSMENT OF THE APPLICATION

This is not a planning application and the planning merits are not relevant to this submission. Rather the applicant seeks to prove by the submission of evidence that the *building operation has been in continuous use for a period in excess of 10 years and is therefore immune from enforcement action.

Section 191 of the Act indicates that the burden of proof lies with the applicant, but the relevant test is 'the balance of probability'. Local Planning Authorities (LPAs) are advised that unless the applicant's evidence is imprecise or ambiguous, or the LPA has evidence of its own which contradicts or undermines the applicant's version of events), a certificate should be issued.

The applicant must prove that the use referred to in the application was lawful for planning purposes on the date of the application. The accompanying application form asserts that the use and/or activity of the entire property as a nursery commenced over four years ago before 07/02/2019. However, this application will be assessed over the required ten years for this type of change of use from the upper floors being changed from residential to the full use as a nursery.

In this case, a Certificate is sought on the grounds that the entire property at 100 Lansdowne Road N17 has been in use as a nursery for a continuous period of 10 or more years.

INFORMATION PROVIDED BY THE APPLICANT

The application is accompanied by the following evidence:

Evidence to Support – submitted with the application

1. Pre-existing photos of the application property - Dated 2007

2. Extract 'on roll' register for 2009 -2010

These show that the property was being used for childcare but does not confirm that the entire property was being used as a nursery.

3. Ofsted inspection report - Dated 8 June 2010

This document shows that at the time the home was being used a family home with childminding facilities but not as a nursery.

4. Ofsted Correspondence - Dated 25 December 2012

The document refers to childminding and home child care but does not refer to the entire home being used as nursery.

5. As-Built Ground Floor and First Floor Plans

The floor plans show the works approved with the claim that the property was a C3/residential at the time of submission in 2018/2019.

6. Pictures of completed construction works - Dated August 2018

As above.

7. Utility Bills - Full itemised bills available upon request

This is utility bills from 2018 onwards however it cannot corroborate that the entire building was in use during the relevant period of time.

8. Selected children reports (Sent to parents daily)

9. 'On Roll' Registers from 2018-2022

10. Ms Georgina Bossman's Statutory Declaration

11. Mrs Beverley Azebiah's Statutory Declaration

12. Letter of support from the Local Authority

13. Letters of support from seven local families

14. Local petition signed by multiple residents

ASSESSMENT

The application is not about the capability or the reputation of the nursery, it is assessing whether the entire building has been used as a nursery for the relevant ten years.

It is acknowledged that the residential property has been used for childminding services since 2008. However, as claimed throughout the submitted evidence/statement/statutory declarations/support from the local authority and parents the use become a nursery from 2018. This does not meet the ten years requirement.

In addition, two applications in 2018 (HGY/2018/0296 section 7; HGY/2018/0911 section 14) and a further application in 2019 (HGY/2019/1034), from the applicants' own admission, where asked about the existing use of the property consistently describe it as C3 dwelling house/residential use.

Hence, the reason for the Certificate of Lawfulness applications for a dormer, and later an outbuilding being approved. The claim that works commenced for the extensions in 2018 corroborate with the proposals in the approved applications. There was a pre-application meeting prior to the approval of HGY/2018/0911 in 2017. The advice was that the use of the entire property would not be acceptable as a day care centre. The application was therefore submitted and approved based on the nursery being confined to the ground floor with a certain number of children in attendance. As stated earlier the application was submitted as works to a residential dwelling house including the change of use of the ground floor to nursery use.

SUMMARY AND CONCLUSION

The application of judicial authorities (Gabbitts et al) on lawful development certificate applications has always been predicated on three key tenets:

Is the applicant's evidence precise?
Is the applicant's evidence unambiguous?
Is the applicant's evidence consistent?

Based on the evidence submitted by the applicant and the evidence held by the LPA the response to all the three questions is no

The evidence held by the Council contradicts the submissions by the applicant that on the balance of probabilities that the entire property has been in use as a nursery for the past ten years. The applicants evidence also does not demonstrate on the balance of probability that the entire the property has been in use as a nursery for the past ten years. The submission is therefore not lawful by virtue of s.171(B)(2) of the Town and Country Planning Act 1990.

RECOMMENDATION

REFUSE CERTIFICATE

Refusal Reasons:

The Local Planning Authority is not satisfied that, on the balance of probabilities, the whole of the site has been in continuous use for a period of ten years before the date of this application as a childcare nursery within Use Class E.